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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 76

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, AND W. ALEXANDER JULIAN, TREASURER OF THE UNITED STATES, PETITIONERS

vs.

HARTWELL CABELL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 15, 1945
CERTIORARI GRANTED JUNE 4, 1945

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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1 In United States Circuit Court of Appeals for the Second Circuit

HARTWELL CABELL, PLAINTIFF-APPELLANT

v.

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, AND W. ALEXANDER JULIAN, TREASURER OF THE UNITED STATES, DEFENDANT-APPELLEES

Statement under rule XIII

This proceeding was commenced on June 29th, 1944, by the filing of the complaint herein and the issuance of a 60-day summons addressed to the defendants.

On August 29th, 1944, the defendants filed a notice of motion for judgment dismissing the complaint upon six stated grounds. The plaintiff, however, by consent, filed an amended complaint on September 13, 1944, and the motion to dismiss the original complaint was thereupon withdrawn.

On September 22nd, 1944, the defendants filed a notice of motion for judgment dismissing the amended complaint upon four stated grounds. This motion came on to be heard before Hon. John Bright, District Judge, on November 28th, 1944. On the argument the defendants withdrew the last two grounds stated in their notice of motion in so far as this case is concerned.

2 The opinion granting the motion to dismiss the amended complaint without prejudice was filed January 4, 1945. The order and judgment dismissing the amended complaint without prejudice was entered January 11, 1945.

The notice of appeal was filed January 18th, 1945.

There has been no change of parties since this proceeding was commenced.

In District Court of the United States for the Southern District of New York

(Same title.)

Amended complaint

This action arises under the Trading with the Enemy Act of October 6th, 1917 (40 Stat. L. 411), as amended and supplemented. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

1. Plaintiff is not a National of a foreign or enemy country, but is a citizen of the United States and is now and during the period in which the legal services hereafter were rendered and disburse-

ments made, was, a member of the New York Bar, residing within the Southern Judicial District of New York. During that period and until the latter part of the year 1942 he was senior partner of the law firm of Cabell & Cabell. That firm, which was composed of the plaintiff and one William D. Cabell, was at that time dissolved owing to the appointment of William D. Cabell as Lieutenant of the United States Navy and his consequent retire-
3 ment from professional activity. By the terms of said dissolution plaintiff became sole owner of the claim upon which this cause of action is based.

2. The defendant, James E. Markham, is the duly appointed, qualified, and acting Alien Property Custodian of the United States; and the defendant W. Alexander Julian, is the duly appointed, qualified, and acting Treasurer of the United States.

3. In the year 1935 the Assicurazioni Generali di Trieste e Venezia, an Italian Corporation whose Home Office was located in Trieste, Italy (hereinafter referred to as the "Italian Company"), established a branch in the United States, whose principal office was in New York City. Said branch was named General Insurance Company of Trieste & Venice, and is hereinafter referred to as the "United States Branch."

4. Cabell & Cabell acted as general counsel for the company in connection with its American business upon an annual retainer of $5,000, from the establishment of said Branch until April 30th, 1941. On that day, owing to international conditions, and the possibility of a war between this country and Italy, it was mutually agreed between the Manager of the company's United States Branch, and Cabell & Cabell, that the retainer arrangement should be terminated and the services thereafter to be rendered by the firm should be charged and paid for from time to time.

5. The services rendered, together with disbursements incurred in connection therewith, were thereafter charged from time to time in accordance with said arrangement.

6. During the period from April 30th, 1941 until July 25th, 1941, a number of actions were commenced in the
4 New York Courts against the Italian Company, based upon contracts and policies of insurance originally issued in various European countries to residents in such countries. In a number of these cases writs of attachment were issued and served upon various banks and trust companies in New York City, having accounts with the United States Branch of the Italian Company, including the Guaranty Trust Company of New York, which was the trustee-depositary of the statutory trust funds belonging to the United States Branch deposited in trust for the benefit of its American policyholders and creditors required by the New York Insurance Law.

7. Since the Court of Appeals of New York had held in the First Russian Insurance Co. case (253 N. Y. 365) that foreign creditors of an alien company with a Branch in this country could attach the funds of the branch located here and that such attachments were valid as to any excess remaining of said funds, after the payment of all American creditors, and in view of the fact that the United States Branch assets of the said Italian Company exceeded by something like $2,000,000 all its liabilities in this country, steps had to be taken (a) to release attachments, since their continuance would have compelled the New York Superintendent of Insurance to take the Branch over for liquidation, and (b) to protect the Italian Company from judgment in excess of the amounts actually payable under its policies and contracts.

8. Appearances were entered for the defendant Assicurazioni Generali di Trieste e Venezia, in all these suits by Cabell & Cabell; and in those actions in which writs of attachment had been issued, bonds to release the attachments were obtained and the necessary collateral secured from the Home Office of the Company for that purpose. In all cases contracts and policies issued abroad were carefully studied and answers prepared and served, setting up defenses against recovery thereon in our courts.

9. Within a very short time it became evident that the continued operation of the Branch under existing international and local conditions was out of the question, and an agreement was reached with Dr. Ignazio Hornik, the Manager of the United States Branch, who was also an officer (Vice President) on the staff of the Home Office of the Company, that Cabell & Cabell should be presently paid an agreed fee, as well as anticipated disbursements, in advance, for their services to be rendered in the defense of the pending cases against the Company in our Courts, and in defending those which might be brought thereafter. The amount to be paid for these services was fixed at $5,000, and the amount of the estimated disbursements was to be $1,000.

10. While Dr. Hornik was trying to get the formal approval of the company to these amounts, as well as pending charges for services that had already been rendered, other actions were initiated or threatened, and Cabell & Cabell advised the United States Manager that in order to conserve United States assets of the Company, the Superintendent of Insurance should be petitioned to take over the Branch for liquidation. With the approval of said Manager this petition was presented to the New York Superintendent of Insurance, and as a result the United States Branch with all its assets was formally taken over under an order of Court, on July 25th, 1941.

11. In due course Cabell & Cabell filed their claim with the New York Liquidator for services and disbursements in the sum

6 of $21,848.89, which sum included the $5,000 agreed upon for services to be rendered in the pending litigations against the Company and the $1,000 estimated disbursements to be expended in connection therewith. The claim as filed was endorsed as follows:

"The above claim for services and disbursements by Cabell & Cabell, has been submitted to the Home Office of Assicurazioni and has been approved.

(Signed) ASSICURAZIONI GENERALI
By DR. IGNAZIO HORNIK."

12. The New York Superintendent of Insurance disallowed the claim as filed to the extent of $7,000. The disallowance included the $5,000 agreed upon for services to be rendered in connection with pending actions; the $1,000 estimated disbursements in connection therewith; and a further sum of $1,000 for services rendered sometime prior to the order of liquidation, that amount being arbitrarily fixed by the Liquidator in connection with certain consents obtained by Cabell & Cabell from the New York Superintendent for the release of funds out of the statutory trust funds of the United States Branch, the funds so released being intended for investments for account of the Home Office. The ground for the disallowance was that the services rendered and to be rendered and the disbursements to be incurred, were not for the benefit of the United States Branch but for the Home Office, and were, therefore, not properly chargeable against the assets of the Branch. The balance of the claim amounting to $14,848.89 was paid in due time.

13. Relying upon the decision of the New York Court of Appeals in Matter of People (Norske Lloyds Insurance Co.), 242 N. Y. 148, and upon the fact that the contract for services
7 was made with the Manager of the United States Branch although submitted by him for approval by the Home Office of the Company, Cabell & Cabell resisted such disallowance by appropriate court action. The disallowance by the Superintendent of the $7,000 was finally upheld by the New York Court of Appeals (N. Y. Law Journal, February 25th, 1944).

14. There has never been any dispute as to the value of the services rendered. As stated above the consent and approval of the claim by the Home Office was certified by the United States Manager and Vice President of the Company, Ignazio Hornik, certified by endorsement upon the claim as filed with the Liquidator, and the attitude of the New York Superintendent of Insurance as Liquidator, is shown by a letter from Alfred C. Bennett, Attorney for the Superintendent, who had charge of the liquidation, the letter being dated March 21st, 1944, and directed to Mr.

Edward Feldman, the person in charge of the New York Office of the Alien Property Custodian; copy of this letter is attached to this complaint and marked "Exhibit A."

15. The actual disbursements incurred amounted to $922.02, and the claim of $1,000 to cover disbursements, as originally filed, should be reduced to that amount.

16. In view of the fact that under the arrangement made with the United States Branch Manager, the services to be rendered and which were thereafter actually rendered by Cabell & Cabell, were to be paid for in advance as a retainer, and that such payment would have been made but for the contingencies leading to the taking over of the assets of the Branch by the New York Insurance Department, it is submitted that under the decision of the United States Supreme Court in Hicks v. Guinness (269
8 U. S. 71), interest should be allowed upon the claim from July 25th, 1941, the date of the order for liquidation of the United States Branch.

17. On March 11, 1942, one Leo T. Crowley was the duly appointed, qualified and acting Alien Property Custodian, and the said Leo T. Crowley remained in that office until March 27th, 1944. On October 7th, 1942, by Vesting Order No. 218, the said Leo T. Crowley, being then Alien Property Custodian of the United States, vested in himself as such Alien Property Custodian all funds and properties in this country belonging to the Italian Company, including properties of the said United States Branch. On December 9th, 1942, by Vesting Order No. 468, the said Leo T. Crowley, being then Alien Property Custodian, vested in himself as such Alien Property Custodian, the excess, if any, of the reserve fund being retained by the Superintendent of Insurance of the State of New York, as Liquidator of the United States Branch, for the purposes of the domestic liquidation.

18. Upon information and belief, all funds and properties in this country belonging to the Italian Company, including properties of the said United States Branch, with the exception of a small reserve fund now remaining in the hands of the Superintendent of Insurance of New York, as Liquidator of said United States Branch, have been delivered to the said James E. Markham, as Alien Property Custodian of the United States, and there is now in his possession or under his control, as such Alien Property Custodian, ample funds out of which plaintiff's claim, if allowed, can be paid.

19. A notice of this claim dated and verified January 19th,
9 1943, was filed with the Alien Property Custodian on or about that date and by him assigned the number F-38-98-1. An amended and supplemental notice of the claim dated and verified May 1st, 1944, has, at the suggestion of the Alien Property

Custodian, been executed and filed and a new number, to wit, 280 has been assigned thereto.

Wherefore, the plaintiff demands a judgment against the defendants James E. Markham, Alien Property Custodian, and W. Alexander Julian, Treasurer of the United States, directing them to pay to the plaintiff out of the assets of the former United States Branch of the Assicurazioni Generali di Trieste e Venezia, in their possession or under their control, the sum of $6,922.02, with interest thereon at six percent from July 25th, 1941.

CHARLTON OGBURN,
Attorney for Plaintiff.

(Verified on September 11, 1944, by Hartwell Cabell, as Plaintiff.)

Exhibit A, annexed to amended complaint

MARCH 21, 1944.

Re: The General Insurance Company Ltd. of Trieste and Venice (Assicurazioni Generali di Trieste e Venezia)—Fees of Hartwell Cabell, firm of Cabell & Cabell

Mr. EDWARD FELDMAN,
Supervisor, Bank and Insurance Liquidations,
Office of Alien Property Custodian, Room 629,
280 Center Street, New York City.

DEAR MR. FELDMAN: Mr. Hartwell Cabell was in to see me yesterday with reference to the above matter and advised me that his claim has been filed with the Alien Property Custodian under File No. F-38-98-1. According to his information, the matter is being handled in the Alien Property Custodian's office by Mr. James McKenna.

As you will recall, our Bureau disallowed $7,000.00 of Mr. Cabell's claim upon the theory that the services rendered were for the benefit of the Home Office of Home Fund and not for the domesticated United States branch. We allocated $1,000.00 of the claim for services rendered in Ohio, and the proposed transfer of assets to the Italian Superpower Corporation, both of which matters were classified as Home Office matters and not for the benefit of the United States branch. $5,000.00 of the claim was allocated by specific agreement between Mr. Cabell and the
11 Home Office and was in connection with the defen[illegible] of actions brought by Mr. Cabell for one year following the entry of the liquidation order from September 1, 1941, on. $1,000.00 of the claim was for disbursements incurred by him.

As you know, the Court of Appeals has recently affirmed the order of the Appellate Division sustaining our classification of the

$7,000.00 as a foreign claim. Mr. Cabell now advises us that the disbursements incurred by him amounted to $922.02, instead of the $1,000.00 originally stated or claimed by him and that his claim should be modified accordingly.

There was no dispute as to the reasonable and agreed value of his services. In other words, if we had found that this claim were a domestic claim, we would have allowed it for $6,922.02. It is furthermore our opinion (with the exception of the American Citizens Life and Italian Superpower matters, involving $1,000.00 of the claims) that claimant's services were rendered in this country in aid and preservation of the assets which normally, without the intervention of war, would have belonged to the Home Office.

This letter is being addressed to you at the request of Mr. Cabell, who, of course, is anxious to obtain recognition and payment of his claim by the office of the Alien Property Custodian.

Very truly yours,

(Sd) ALFRED C. BENNETT,
Attorney for Superintendent.

ACB:MM.

12 In United States District Court

(Same title.)

Notice of motion to dismiss amended complaint

SIR: Please take notice that upon the amended complaint herein, the defendants James E. Markham, Alien Property Custodian, and W. Alexander Julian, Treasurer of the United States, will move this Court, at a Motion Term thereof to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 3rd day of October 1944, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for judgment dismissing the amended complaint upon the ground that this Court lacks jurisdiction over the subject matter of the action or that the amended complaint fails to state a claim upon which relief can be granted in that:

(a) The amended complaint shows that the alleged debt upon which plaintiff's claim is based was not owing to or owned by the plaintiff prior to October 6, 1917, as required by Section 9 (e) of the Trading with the Enemy Act, as amended;

(b) The amended complaint discloses that a notice of the alleged claim could not have been filed or an application made with respect thereto prior to the date of the enactment of the

Settlement of War Claims Act of 1928, as required by Section 9 (e) of the Trading with the Enemy Act, as amended;

(c) The remedies provided by Section 9 of the Trading
13 with the Enemy Act, as amended, are not applicable to any action which may have been taken by the Alien Property Custodian under Section 5 (b) of the said Act, as amended by Title III of the First War Powers Act, 1941; and

(d) The plaintiff has not exhausted the administrative remedies available to him with respect to any action which may have been taken by the defendants, or either of them, or with respect to any claim which may have arisen out of any such action,

and for such other, further, and different relief as may be just and proper in the premises.

Dated: New York, N. Y., September 18, 1944.

Yours, etc.,

JAMES B. M. MCNALLY,
United States attorney for the Southern District of New York, Office & Post Office Address: United States Court House, Foley Square, New York 7, N. Y.

HARRY LEROY JONES,
Acting Chief, Alien Property Unit.

Of Counsel:

JOHN ERNEST ROE,
General Counsel to the Alien Property Custodian.

14 J. A. FRIDINGER,

Attorney, Alien Property Unit, War Division, Department of Justice, Washington, D. C., Attorneys for the Defendants, James E. Markham, Alien Property Custodian, and W. Alexander Julian, Treasurer of the United States.

To CHARLTON OGBURN, Esq.,
Attorney for Plaintiff,
68 William Street, New York, N. Y.

15 In United States District Court, Southern District of New York

(Same title.)

Hartwell Cabell (Plaintiff).

Charlton Ogburn, Esq., Attorney for Plaintiff.

John F. X. McGohey, Esq., United States Attorney for the Southern District of New York.

Harry LeRoy Jones, Esq., Chief, Alien Property Unit.

Irving J. Levy, Esq., Attorney, Alien Property Unit, Attorneys for the Defendants. Of Counsel: William L. Lynch, Esq., Assist-

ant U. S. Attorney. John Ernest Roe, Esq., General Counsel to the Alien Property Custodian.

Opinion of Bright, D. J.

The novel question presented by the defendants' motion to dismiss the complaint is whether or not plaintiff, at all times a citizen of this country and at no time tainted with any enemy alien affiliations, who admittedly has a meritorious claim against an alien enemy whose property was on October 7, 1942, seized by the Alien Property Custodian, for attorney's services rendered in 1935 and thereafter, is precluded from recovering it by the provisions of Section 9 (e) of the Trading With the Enemy Act as amended (40 Stat. 411 et seq, 50 U. S. C. app. Sec. 9 (e)) which states that in no event "shall a debt be allowed under this Section unless it was owing to and owned by the claimant prior to October 6, 1917 * * *; nor shall a debt be allowed under this Section unless notice of claim has been filed, or application therefor has been
16 made, prior to the date of the enactment of the Settlement of War Claims Act of 1928" (Act March 10, 1928, c. 167).

The allegations of the complaint must be deemed admitted. So far as important, they are that this action arises under the Trading With the Enemy Act as amended; that in 1935 an Italian insurance company established a branch in the United States; that plaintiff's firm, of whose claim he is now the sole owner, rendered legal services to the Italian company, and incurred certain disbursements between 1935 and April 30, 1941, of the reasonable value of $6,000 plus $922.02 disbursements, the validity and justice of which has been admitted by the Italian company and is conceded here; that on October 7, 1942 and December 9, 1942, the Alien Property Custodian vested in himself all of the funds and properties of the Italian company for the purpose of domestic liquidation, ample in amount to pay the plaintiff's claim; that a notice of plaintiff's claim was filed with the Custodian on January 19, 1943, which was amended on May 1, 1944, at the suggestion of the Custodian; and has not been paid.

It is thus apparent that the debt was not "due and owing" prior to October 6, 1917, and that notice of claim could not be filed prior to March 10, 1928. For these reasons, defendants contend that the motion must be granted. Plaintiff, admitting that his claim does not come within the strict word of the Act under which he sues, argues that the spirit of the Act clearly contemplated that he should be protected.

It is obvious that Congress in the Trading With the Enemy Act, while generally authorizing the appointment of an Alien Prop-

erty Custodian and not confining such authorization to World War I, at least, insofar as the rights of the American citizens
17. are concerned to recover their debts from the property of alien enemies seized by the Alien Property Custodian, has literally confined such rights to those accrued prior to the first World War. No question is made but that this suit is in effect against the United States and cannot be maintained unless the government has consented thereto. Congress obviously did not envision another conflict such as that in which we are now engaged, or the accrual of claims such as this arising by reason of it. In view of its intent to do justice to creditors of former enemy aliens, it undoubtedly would be so inclined toward those similar creditors who are affected by the present conflict. Can that result be obtained by any construction of the 1917 Act and its amendments without a further congressional authorization, is the question posed.

The original Act imposed no such restrictions. The original Section 9 provided that "Any person, not an enemy or ally of an enemy, * * * to whom any debt may be owing from an enemy, * * * whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file * * * a notice of claim * * * and may at any time before the expiration of six months after the end of the war, institute a suit in equity * * * to establish the * * * debt so claimed." &c.

It did not refer to any particular war. It was not until June 5, 1920, that subdivision (e) was added and then the only restriction was that the debt must have been owing to and owned by the claimant prior to October 6, 1917. The six months limitation in the original section was extended to eighteen months by the Act of February 27, 1921, c. 76, and to thirty months by the Act of December 27, 1922, c. 13. The further restriction that notice of claim must be filed prior to the enactment of the settle-
18 ment of the War Claims Act was added on March 10, 1928.

Thus, it is argued, that inasmuch as the original Section 9 has not in its then terms been materially altered, this court may assume that the spirit of the Act was to pay citizen creditors out of the moneys impounded by the Alien Property Custodian in any way, particularly in a case such as this where it is impossible to comply with conditions subsequently imposed.

I do not think that this court can go so far in face of the actual terms of the statute and its amendments. To do so would require me to rewrite the statute to include another date when the claim must be owing, when it must be presented for collection,

when it must be filed, and to prevent World War I claims from creeping in for representation. The Act as amended does not wipe out plaintiff's claim; the most that can be said is that recovery is postponed until after the war, or at least until Congress recognizes the obvious inequality or injustice of the situation as affecting creditors of alien enemies such as plaintiff here, and shall amend the Trading With the Enemy Act to make provision for recoveries in cases arising out of the present conflict.

It is further urged that if the Act is construed as to defeat plaintiff's remedy, it is unconstitutional. I do not think that question arises in this suit which, it is pleaded, "arises under the Trading With the Enemy Act of October 6, 1917 (40 Stat. L. 411), as amended and supplemented." Plaintiff cannot, in my opinion, seek the benefit (obviously illusory) of that enactment, and, at the same time, seek its nullification. He might, more appropriately, and probably with more success, seek his remedy in Congress which has not, under similar circumstances, turned a deaf ear to equally meritorious obligations of our citizens. The absence of any method for collecting the debt out of the funds in possession
19 of the Alien Property Custodian is not a defect rendering the statute unconstitutional (Kogler v. Miller, 288 Fed. 806–808), for no property right had been taken from the plaintiff. Pusey & Jones Company v. Hannsen, 261 U. S. 491–497. The case of Becker Company v. Cummings, 296 U. S. 74, is not determinative of constitutionality. There doubtful constitutionality was founded upon a seizure commanded by statute "if the remedy given (by Section 9 (a)) were inadequate to secure to the non-enemy owner either the return of his property or compensation for it." None of plaintiff's property was here seized.

The motion to dismiss is granted, without prejudice.

JOHN BRIGHT,
United States District Judge.

Dated January 3, 1945.

20 In United States District Court, Southern District of New York

(Same title.)

Order and judgment

The defendants having moved herein by a notice of motion dated September 18, 1944, for judgment dismissing the amended complaint, and said motion having come on to be heard before the undersigned on the 28th day of November 1944, and after hearing John F. X. McGohey, United States Attorney for the

Southern District of New York, attorney for the defendants (William L. Lynch, Assistant United States Attorney, of counsel), in support of the motion, and Charlton Ogburn, Esq., attorney for the plaintiff (Hartwell Cabell, Esq., plaintiff in person, of counsel), in opposition, and the undersigned having filed a written opinion dated January 3, 1945, directing that the motion be granted without prejudice,

Now, upon motion of John F. X. McGohey, United States Attorney for the Southern District of New York, attorney for the defendants, it is

Ordered, that the defendants' motion to dismiss the amended complaint be and the same hereby is in all respects granted without prejudice; and it is

Further ordered and adjudged, that the amended complaint herein be and the same hereby is dismissed for lack of jurisdiction without prejudice.

Dated New York, N. Y., January 10th, 1945.

Approved:

JOHN BRIGHT, *U. S. D. J.*

Judgment rendered this 11th day of January 1945.

GEORGE J. H. FOLLMER, *Clerk.*

21 In United States District Court

[Title omitted.]

Notice of appeal

SIRS: Please take notice that the above named plaintiff herein, Hartwell Cabell, hereby appeals to the Circuit Court of Appeals for the Second Circuit, from the Order dismissing the Amended Complaint herein, without prejudice, and from the final judgment rendered pursuant to the aforesaid Order and entered in this action on January 11th, 1945, and from each and every part of said Order and Judgment.

Dated New York, N. Y., January 18, 1945.

Yours, etc.,

CHARLTON OGBURN,

Attorney for Plaintiff, Office and Post Office Address, 68 William Street, Borough of Manhattan, New York City.

22 To:

JOHN F. X. MCGOHEY, Esq.,
United States Attorney for the Southern District of New York.

CLERK OF THE UNITED STATES DISTRICT COURT,
For the Southern District of New York.

In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Designation of contents of record on appeal

Please take notice that the Appellant herein designates the following as the contents of the record on appeal:

1. Statement required by Rule XIII.
2. Notice of Appeal.
3. Amended Complaint.
4. Notice of Motion to Dismiss the Amended Complaint.

23 5. Opinion of Court on motion for judgment dismissing the amended complaint.

6. Final Order and Judgment.
7. Designation of contents of record.
8. Stipulation that copy of record is a true transcript.

Dated New York, January 24th, 1945.

CHARLTON OGBURN,
68 William Street, New York City,
Attorney for the Appellant.

To JOHN F. X. MCGOHEY, Esq.,
United States Attorney for the Southern District of New York,
Attorney for Appellees.

24 In the United States Circuit Court of Appeals for the Second Circuit

(Title omitted.)

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a true and correct Transcript of the Record of the District Court as agreed upon by the parties.

Dated New York, N. Y., February 13, 1945.

CHARLTON OGBURN,
Attorney for Plaintiff-Appellant.
JOHN F. X. MCGOHEY,
United States Attorney,
Attorney for Defendants-Appellees.

25 [Clerk's certificate to foregoing transcript omitted in printing.]

26 In United States Circuit Court of Appeals for the Second Circuit

No. 279—October Term, 1944

(Argued March 14, 1945—Decided April 3, 1945)

HARTWELL CABELL, APPELLANT

v.

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, AND W. ALEXANDER JULIAN, TREASURER OF THE UNITED STATES, APPELLEES

Before L. HAND, AUGUSTUS N. HAND, and CLARK, Circuit Judges.

Appeal from a judgment of the District Court of the Southern District of New York, dismissing a complaint filed under § 9 (a) of the Trading With the Enemy Act, by the creditor of an alien whose property had been seized by the Alien Property Custodian.

HARTWELL CABELL, *pro se.*

WILLIAM L. LYNCH, *for the appellees.*

Opinion

27 L. HAND, C. J.:

This appeal depends upon the meaning of a part of the proviso to § 9 (e) of the Trading with the Enemy Act, as amended on March 10, 1928, which we quote in the margin.* The plaintiff filed a complaint under § 9 (a) of that act, alleging that he was a creditor of an Italian insurance company, whose assets in this country the predecessor in office of the defendant, Markham, had seized, as Alien Property Custodian; and that he had presented his claim in due form to the Custodian, who refused to recognize it. The defendants moved to dismiss the complaint because of its insufficiency in law, on the ground that the claim had not been in existence before October 6, 1917, and had not been filed before the date of the enactment of the Settlement of War Claims Act of 1928. The judge held that, since both these facts appeared in the complaint, the proviso of § 9 (e) just quoted covered the situation; and for this reason he dismissed the complaint.

When the Trading with the Enemy Act was first passed on October 6, 1917, it contained the substance of what is now subdivision (a), but nothing more. It was amended again and again, but

*"nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder; nor shall a debt be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928."

subdivision (e) was not added until 1920 (41 St. L. 90), though from the first it provided that no debt should be paid which had not been "owing" before October 6, 1917. The addition that the claim should be presented before March 10, 1928, dates from
28 the amendment of that year. (45 St. L. 271). The statute was not reenacted when the present war broke out; nor was that necessary, for it automatically went into effect again. This appears, for example, from the definition of the phrase, "beginning of the war," in § 2 (e), ("the day on which Congress has declared or shall declare war"); from § 302 of Title III of Chapter 593 of Laws of the First Session of the 77th Congress (55 St. L. p. 839), which assumes that it had not been in force before December 8, 1941, and that it went into effect again at once thereafter; and because § 5 (b) was amended without mention of any other part (55 St. L. 839, 840). For this reason it seems proper for purposes of interpretation to interpret it as though it had been enacted on December 8, 1941, when the present war was declared. Were that literally the case, we should be faced with a statute, subdivisions (a) and (e) of which flatly contradicted each other. Subdivision (a) provides that "any person * * * to whom any debt may be owing * * * may file * * * a notice of his claim * * * and the President * * * may order the payment * * * of the money * * * held." If the President does not order payment, the "said claimant may institute a suit in equity * * * to establish the debt so claimed and if so established the court shall order the payment * * * to which the * * * claimant is entitled." This language is mingled with that giving a remedy for property mistakenly seized, and it is unnecessary to labor the point that it was intended to put creditors upon an equal footing with owners. Indeed, although we assume it to be true that for constitutional purposes it was not necessary to allow the alien's creditors any recourse to the seized property, since the alien himself remains liable; for practical purposes there is little difference between debts and claims to property.

It is at least arguable that the whole of subdivision (e) is limited to seizures made during the first war. It begins with a pro-
29 vision that "a citizen or subject of any nation which was associated with the United States in the prosecution of the war" may recover his property or collect his debt only in case that nation gave reciprocal rights to citizens of the United States. The use of the preterite is significant, particularly when coupled with the word, "associate," which it will be remembered was chosen during the last war in sedulous avoidance of any implication that we had "allies." If this be true, it would be indeed unreasonable not to confine the proviso similarly: that is, to read it otherwise

than as limited to seizures made during that war. If we do not so read it, the result is really nonsense, for the remedy given in subdivision (c), which is prospective, is completely defeated by subdivision (e). Nobody can seriously believe that a general plan designed to be successively suspended and revived, as peace and war should alternate, was meant to be permanently mutilated by a statute of limitation expressly made applicable to only the first of its phases. The defendants have no answer except to say that we are not free to depart from the literal meaning of the words, however transparent may be the resulting stultification of the scheme or plan as a whole.

Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute. We need cite no others than the more recent of those in the the Supreme Court which have followed Holy Trinity Church v. United States, 143 U. S. 457. Pickett v. United States, 216 U. S. 456, 461; American Surety Company v. District of Columbia, 224 U. S. 491, 495; Ozawa v. United States, 260 U. S. 178, 194; United States v. Katz, 271 U. S. 354, 362; Sorrells v. United States, 287 U. S. 435, 446–448. See also United States v. Ryan, 284 U. S. 167, 175; Armstrong v. Nu-Emanel Corp., 305 U. S. 315, 333; and United States v. American Trucking Associations, 310 U. S. 534, 543, 544. As Holmes, J., said in a much quoted passage from Johnson v. United States, 163 Fed. Rep. 30, 32: "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." See also Van Beeck v. Sabine Towing Co., 300 U. S. 342, 351; Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 391; United States v. Hutcheson, 312 U. S. 219, 235. Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. Since it is utterly apparent that the words of this proviso were intended to be limited to seizures made during the last war, and could not conceivably have been intended to apply to seizures made when another war revived the Act as a whole from its suspension, it does no undue violence to the language to assume that it was implicitly subject to that condition which alone made the Act as a whole practicable of administration.

Judgment reversed.

31 In United States Circuit Court of Appeals,
Second Circuit

Present: Hon. LEARNED HAND, Hon. AUGUSTUS N. HAND, Hon. CHARLES E. CLARK, Circuit Judges.

HARTWELL CABELL, PLAINTIFF-APPELLANT

v.

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, AND W. ALEXANDER JULIAN, TREASURER OF THE UNITED STATES, DEFENDANTS-APPELLEES

Judgment

Filed May 2, 1945

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL, *Clerk.*

[Clerk's certificate to foregoing transcript omitted in printing.]

34 Supreme Court of the United States

Order allowing certiorari

(Filed June 4, 1945)

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] Enter Attorney General. File No. 49724. U. S. Circuit Court of Appeals, Second Circuit. Term No. 76. James E. Markham, Alien Property Custodian, and W. Alexander Julian, Treasurer of the United States, Petitioners vs. Hartwell Cabell. Petition for writ of certiorari and exhibit thereto. Filed May 15, 1945. Term No. 76 O. T. 1945.

* U. S. GOVERNMENT PRINTING OFFICE: 1945